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in the
Supreme Court
of the
United States

OCTOBER TERM 1974

NO. _____

DENNIS EVANS INGHAM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, DENNIS EVANS INGHAM, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 24, 1974.

OPINION BELOW

The Opinion of the Court of Appeals reported at 502 F.2d 1287 (1974) appears in the appendix hereto. The Judgment of the United States District Court for the Southern District of Florida appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 24, 1974. A timely petition for rehearing en banc was denied on December 23, 1974, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the right of customs agents to make a warrantless border search can be extended to vessels already inside the United States upon mere suspicion that vessel has recently arrived.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourth Amendment:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

On December 13, 1971, Petitioner, using the name Dennis Kaufman, purchased the 42 Foot M/V Nurmi for $55,000.00 cash. A co-defendant, Steven McCarthy, on December 22, 1971, entered into a rental agreement for the lease of a house located at 240 Golden Beach Drive, Golden Beach, Florida. This lease was to cover January 1, 1972 to April 30, 1972.

Customs agent William Norsworthy testified that he had first received information concerning M/V Nurmi on January 8, 1972, at which time he initiated a search to ascertain where the vessel was berthed.

On January 11, 1972 and January 12, 1972 the boat was located at the dock behind 240 Golden Beach Drive.

On January 25, 1972, the M/V Nurmi, with Petitioner on board was sighted in Colombia.

On February 6, 1972, Agent Lynch observed the vessel in Bahamian waters at 1:00 P.M. and at 2:30 P.M.

Later on February 6, 1972 other agents observed the M/V Nurmi in local waters as it approached the dock at 240 Golden Beach Drive.

At approximately 8:05 P.M. Agents boarded and searched the boat finding 4,000 pounds of marijuana in the aft cabin.

Petitioner was found guilty of conspiracy to import marijuana into the United States, importation of mari-

juana and possession with intent to distribute. Petitioner was sentenced to five years on each count to run concurrently.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS REGARDING EXTENDED BORDER SEARCHES WITHOUT PROBABLE CAUSE.

In the case of **Almeida-Sanchez v. U.S.**, 413 U.S. 266, 37 L.Ed.2d 596, 93 S.Ct. 2535 (1973) this Court condemned roving patrol searches by border patrol agents on a State Highway which was at all points at least 20 miles north of the Mexican border stating that in the absence of probable cause or consent that search violated petitioner's right to be free of "unreasonable searches and seizures".

In the instant case the vessel in question was observed outside the United States and then later observed to approach and dock behind the co-defendant's house.

The record is devoid of any testimony as to probable cause for the search. The time between the sighting outside the United States and the one inside, some five hours, would have permitted one or more stops within the United States prior to the landing where the search and arrest took place.

The vessel in question was never seen crossing the border nor was it stopped or boarded by the Coast Guard or Customs Agents as it travelled in Florida waters prior to docking.

The search in the instant case was not a fixed check point border search, but was more similar to the roving patrol search in **Almeida-Sanchez,** supra.

In **Bowen v. U.S.,** 413 U.S. 915, 37 L.Ed.2d 1038, 93 S.Ct. 3069 this Court granted the petition for certiorari vacating the opinion of the Ninth Circuit **Bowen v. U.S.,** 462 F.2d 347 and remanded the case for further consideration in light of **Almeida-Sanchez.**

The **Bowen** case involved a fixed check point search **Bowen v. U.S.,** 500 F.2d 960 (1974) and the Court's decision has direct bearing on the facts in the instant case and is in direct conflict with it.

In **Bowen,** the defendant was stopped at a fixed checkpoint 49 miles from the border. The Court held:

> "We hold here that under the rule announced by the Supreme Court in Almeida-Sanchez the search of Bowen's camper truck violated the Fourth Amendment because the search was not the functional equivalent of a border search and was authorized neither by warrant nor by probable cause."

In **Bowen** supra, the Court also referred to two lines of cases prior to **Almeida-Sanchez.**

The first is typified by **Alexander v. U.S.,** 362 F.2d 379 (9th Cir.) cert. den. 385 U.S. 977, 87 S.Ct. 519, 17 L.Ed.2d, 439 (1966) where customs officials acting upon a tip from an informer, placed the defendant's vehicle under surveillance when it crossed the border, and kept it under

almost continuous watch as it made suspicious movements through the streets of a border city, in upholding the subsequent search as a border search the Court stated:

> "Where . . . a search for contraband by customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination of whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of the search was abroad the vehicle at the time of entry into the jurisdiction of the United States." See Also **U. S. v. Mejias,** 452 F.2d 1190, 1192, 1193 (9th Cir. 1971); **U.S. v. Terry,** 446 F.2d 579 (9th Cir.) cert. denied, 404 U.S. 946, 92 S.Ct. 301, 30 L.Ed.2d 261 (1971); **Castillo-Garcia v. U.S.,** 424 F.2d 482, 484, 485 (9th Cir. 1970); **Bloomer v. U.S.,** 409 F.2d 869, 870, 871 (9th Cir. 1969); **Gonzalez-Alonso v. U.S.,** 379 F.2d 347, 349, 350 (9th Cir. 1967); **Rodriquez-Gonzalez v. U.S.,** 378 F.2d 256, 258 (9th Cir. 1967); **Leeks v. U.S.,** 356 F.2d 470, 471 (9th Cir. 1966); **King v. U.S.,** 348 F.2d 814, 816 (9th Cir.), cert. denied, 382 U.S. 926, 86 S.Ct. 314, 15 L.Ed. 2d 339 (1965); **Murgia v. U.S.,** 285 F.2d 14 (9th Cir. 1960), cert denied 366 U.S. 977 81 S.Ct. 1946, 6 L.Ed.2d 1265 (1961), cert. denied, 376 U.S. 946, 84 S.Ct. 803, 11 L.Ed.2d (1964)."

In the second line of cases, the Ninth Circuit treated a search as the equivalent of a border search, where it appeared with reasonable certainty that the vehicle searched contained either goods which had just been smuggled or a person who had just crossed the border illegally **U.S. v. Weil,** 432 F.2d 1320 (9th Cir. 1970) cert. denied., 401 U.S. 947, 91 S.Ct. 933, 28 L.Ed.2d 230 (1971).

In **Bowen,** supra, the Ninth Circuit held that **Almeida-Sanchez** would not be given retroactive effect. The search in the instant case took place in 1972 prior to the Court's decision in **Almeida-Sanchez.**

It is believed that the question of retroactivity of the **Almeida-Sanchez** case is presently before the Court in the cases of **U.S. v. Bowen,** 73-6848, **Ortiz v. U.S.,** 73-2050 and **Brigoni-Ponce v. U.S.,** 74-114. See 42 L.Ed.2d 47.

In the case at bar whichever decision is finally reached as to the retroactive application of **Almeida-Sanchez** the opinion in the Fifth Circuit will still be in conflict with decisions of other Courts of Appeals or this Court.

Assuming arguendo that **Almeida-Sanchez** and its progeny apply the search in the instant case would violate the Fourth Amendment due to the absence of probable cause or a search warrant. If, on the other hand, pre **Almeida-Sanchez** law is applied the opinion in the instant case is in direct conflict with **Alexander v. U.S.,** supra, and the numerous other cases to the same effect.

In the Alexander case, supra, the Ninth Circuit held that to justify as a border search a search removed in time or distance from the border, the Court must consider

"(whether there is) reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of its entry into the jurisdiction of the United States."

The Court in Alexander deemed it crucial that authorities had the vehicle under almost constant surveillance from the time it crossed the border until the time of search. In the instant case, the Court deemed it irrelevant that the vessel was seen at 2:30 near Bimini (Also near the territorial limits of the U.S.) and then not seen again for five hours, until it approached the co-defendant's house.

In the instant case, the Court held that since the vessel was sighted outside the United States and then inside, the border crossing was obvious and a subsequent search regardless of elapsed time or distance would still be a border search.

CONCLUSION

It is respectfully submitted that the opinion of the Fifth Circuit in the case at bar is in direct conflict with the holdings of this Court and of other Circuits and for that reason certiorari should be granted.

Respectfully submitted,

MAX P. ENGEL and
DAVID B. JAVITS,
Counsel for Petitioner
1461 N.W. 17th Avenue
Miami, Florida 33125

BY: _____
DAVID B. JAVITS

APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 72-117 Cr. JLK
21 U.S.C. 963
M/S 5 Yrs.—$15,000
21 U.S.C. 952(a)
M/S 5 Yrs.—$15,000
21 U.S.C. 841(a)(1)
M/S 5 Yrs.—$15,000
18 U.S.C. 2

UNITED STATES OF AMERICA
VS.

STEPHEN THOMAS MC CARTHY
KEITH MEIGGS
DENNIS EVANS INGHAM

INDICTMENT

The Grand Jury charges that:

COUNT I.

Beginning on or about December 13, 1971 and continuing until on or about February 6, 1972 at Golden Beach,

Dade County, in the Southern District of Florida, the defendants

STEPHEN THOMAS MC CARTHY
KEITH MEIGGS
and
DENNIS EVANS INGHAM

did conspire, combine, confederate and have a tacit understanding with each other and with divers other persons whose names are at the present time to the Grand Jury unknown, to knowingly and intentionally import into the United States from a place outside the United States approximately 4,000 pounds of marijuana, a Schedule I controlled substance in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

The plan and purpose of the conspiracy was as follows:

It was part of said conspiracy that Stephen Thomas McCarthy, Keith Meiggs and Dennis Evans Ingham imported into the United States from a place outside thereof approximately 4,000 pounds of marijuana aboard the vessel NURMI, FL 3749 AN. It was further part of said conspiracy that Stephen Thomas McCarthy, Keith Meiggs and Dennis Evans Ingham docked said vessel behind a residence at 240 Golden Beach Drive, Golden Beach, Florida which had been leased by Stephen Thomas Mc Carthy and then and there possessed said marijuana with an intent to distribute it.

The Grand Jury further charges that the defendants, in order to effect and achieve the goals of the conspiracy did at or about the times and places hereinafter referred to, commit certain overt acts, among which are the following:

OVERT ACTS

1. On or about December 13, 1971 Dennis Evans Ingham purchased the vessel NURMI, FL 3749 AN under the name of "Dennis Kaufman".

2. On or about December 22, 1971 Stephen Thomas Mc Carthy leased the residence located at 240 Golden Golden Beach Drive, Golden Beach, Florida, said lease to commence January 1, 1972 and continue until April 30, 1972.

3. On or about January 19, 1972 Dennis Evans Ingham flew from Miami, Florida to Blouilla, Columbia aboard Avianca Airlines.

4. On or about January 27, 1972 Keith Meiggs, as captain of the vessel NURMI requested in writing permission from the Captain of the Port, Cartagena, Columbia for the vessel NURMI to leave the port of Cartagena, Columbia.

5. On or about February 6, 1972 Stephen Thomas Mc Carthy, Keith Meiggs and Dennis Evans Ingham aboard the vessel NURMI passed through the canal at the north end of South Island in the waters off Golden Beach, Florida.

6. On or about February 6, 1972 Stephen Thomas Mc Carthy, Keith Meiggs and Dennis Evans Ingham docked the vessel NURMI behind the residence located at 240 Golden Beach Drive, Golden Beach, Florida.

7. On or about February 6, 1972 Stephen Thomas Mc Carthy, Keith Meiggs and Dennis Evans Ingham left the vessel NURMI and proceeded into the residence located at 240 Golden Beach Drive, Golden Beach, Florida.

All in violation of Title 21, United States Code, Section 963.

COUNT II

On or about February 6, 1972 at Golden Beach, Dade County in the Southern District of Florida the defendants,

STEPHEN THOMAS MC CARTHY
KEITH MEIGGS and
DENNIS EVANS INGHAM

did knowingly and intentionally import into the United States from a place outside the United States approximately 4,000 pounds of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 952(a) and Title 18, United States Code, Section 2.

COUNT III.

On or about February 6, 1972 at Golden Beach, Dade County in the Southern District of Florida the defendants

STEPHEN THOMAS MC CARTHY
KEITH MEIGGS, and
DENNIS EVANS INGHAM

did knowingly and intentionally possess with intent to distribute approximately 4,000 pounds of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

A TRUE BILL

_____
Foreman

ROBERT W. RUST
UNITED STATES ATTORNEY

By: Barbara E. Vicevich
Assitant United States Attorney

App. 6

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

No. 72-117-Cr-JLK

UNITED STATES OF AMERICA
v.

DENNIS EVANS INGHAM

[Filed May 9, 1972]

JUDGMENT AND COMMITMENT

On this 9 day of May, 1972 came the attorney for the government and the defendant appeared in person and[1] by counsel, Philip Daigneault, Esq.

IT IS ADJUDGED that the defendant upon his plea of[2] Not Guilty, and a Jury Verdict of Guilty has been convicted of the offense of conspiring to import into the United States a quantity of marihuana, a Schedule I controlled substance, importing into the United States a quantity of marihuana, a Schedule I controlled substance, and possessing with intent to distribute a quantity of marihuana, a Schedule I controlled substance, all in violation of Title 21, United States Code, Sections 963, 952(a), 841(a)(1), and Title 18, United States Code, Section 2,

as charged[3] in Counts 1, 2, & 3 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] FIVE (5) YEARS as to Count 1, and TWO (2) YEARS as to each of Counts 2 and 3, said sentences of confinement to run concurrently with each other, or until otherwise discharged by due process of law, and pursuant to Title 18, United States Code, Chapter 311, Section 4208(a)(2), it being further

Ordered that the defendant shall become eligible for parole at such time as the Board of Parole may determine, it being further

Ordered and Adjudged that the defendant shall serve a special additional parole term of TWO (2) YEARS on each of Counts 1, 2, and 3, said parole terms to run concurrently with each other and pursuant to Title 21, USC, Section 841(b)(1), and to commence upon release from sentence hereinabove imposed.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United

States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ James Lawrence King

United States District Judge.

Clerk.

The Court recommends commitment to:[6]

[1]Insert "by [name of counsel], counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty and the court being satisfied there is a factual basis for plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (1) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required. [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of proceeding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court wishing to recommend a particular institution.

App. 9

United States Court of Appeals,
Fifth Circuit.

No. 72-2393
Summary Calendar.*

UNITED STATES of America, Plaintiff-Appellee,
v.

Dennis Evans INGHAM, Defendant-Appellant.

Oct. 24, 1974.

The United States District Court for the Southern District of Florida, at Miami, James Lawrence King, J., found defendant guilty of conspiracy to import marijuana into the United States, importation of marijuana into the United States, and possession of marijuana with intent to distribute, and he appealed. The Court of Appeals, Brown, Chief Judge, held that the warrantless, nonprobable cause search of a vessel newly arrived from a foreign port or place was lawful, irrespective of whether customs agents actually observed the vessel as her stem ploughed over the imaginary boundary between international waters and customs waters of the United States.

Affirmed.

1. Customs Duties—126

Warrantless, nonprobable cause search of a vessel newly arrived from a foreign port or place was lawful,

*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

irrespective of whether customs agents actually observed the vessel as her stem ploughed over the imaginary boundary between international waters and customs waters of the United States. Tariff Act of 1930, § 401(n), 19 U.S.C.A. § 1401(n); Anti-Smuggling Act, § 1, 19 U.S.C.A. § 1701.

2. Customs Duties—126

Conduct of customs agents, whose sightings proved quite convincingly that defendant's vessel had been at a foreign port or place, who observed defendant docking and leaving his vessel after its return from international waters, who, minutes later, approached defendant and identified themselves, and who then discovered in the vessel burlap bags containing 4,000 pounds of marijuana which was seized, was fully justified under the circumstances as a customs search of a newly arrived vessel, whether characterized as a "border search" or not. Tariff Act of 1930, § 401(n), 19 U.S.C.A. § 1401(n); Anti-Smuggling Act, § 1, 19 U.S.C.A. § 1701; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 1002(a), 1013, 21 U.S.C.A. §§841(a)(1), 952(a), 963; U.S.C.A. Const. Amend. 4.

3. Customs Duties—126

Warrantless search and seizure of a vessel or vehicle which has crossed international boundary is not unreasonable simply because authorized federal agents elected not to search the vessel or vehicle at the point of its crossing international boundary line, voluntarily chose not to follow the vessel or vehicle after the crossing, and had sufficient time, both before and after the crossing, to obtain a warrant. U.S.C.A. Const. Amend. 4.

4. Customs Duties—126

Absence of "actual observation" of a boundary crossing does not preclude a subsequent search from qualifying as a "border search." U.S.C.A.Const. Amend. 4.

5. Customs Duties—126

For the protection of revenues and national security, customs officers are entitled to search a newly arrived vessel to determine whether goods requiring entry are aboard, and the officers need not be searching for anything more noxious than a bottle of imported perfume. Tariff Act of 1930, § 581(a), 19 U.S.C.A. § 1581(a).

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge and GOLDBERG and MORGAN, Circuit Judges.

JOHN R. BROWN, Chief Judge:

[1] The only question in this appeal by one caught redhanded with two tons of marijuana aboard is whether to justify a warrantless non-probable cause search of a vessel newly arrived from a foreign port or place someone must actually have observed the vessel as her stem ploughed over the imaginary boundary between International waters and Customs waters of the United States. Just how this is to be accomplished is not clear, whether by a sort of prohibition era counter-hovering ship, 19 U.S.C.A. §§ 1701, 1401(n) or an overhead helicopter each suitably stationed at sightable intervals along the thou-

sands of miles of our East, West and Gulf coastlines. But it doesn't matter since we reject any such rigid mechanical and unrealistic requirements. We affirm.

Dennis Evans Ingham was charged, along with two others, in a three count indictment with violations of 21 U.S.C.A. §§ 963, 952(a) and 841(a)(1).[1] The indictment charged, in Count I, that the defendant conspired with others to import into the United States approximately 4,000 pounds of marijuana; in Count II, that the defendant imported into the United States approximately 4,000 pounds of marijuana; and in Count III, that the defendant possessed that marijuana with the intent to distribute it. Prior to the trial, the appellant filed a timely motion to suppress the fruits of the government's search of his vessel, M/V Nurmi, on the ground that the search and seizure violated his Fourth Amendment rights. The trial court denied appellant's motion after postponing the hearing to the trial. The jury found Ingham guilty as charged in all three counts.

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[1] 21 U.S.C.A. §963 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Section 952 provides:

> (a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—
>
> (1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and
>
> (2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the

[2] The sole question presented for review is whether the government's search and seizure of 4,000 pounds of marijuana from the appellant's vessel fell within the purview of a "border search" or should have been governed by the more stringent procedures applicable to a "domestic search". We find the conduct of the Customs agents under the circumstances fully justified as a customs search of a newly arrived vessel whether characterized as "border search" or not.

A recital of the events which preceded the arrest may be briefly stated.

On December 13, 1971, Ingham, using the alias of Dennis Kaufman purchased the 42 foot M/V Nurmi for $55,000 cash. A co-defendant, Stephen McCarthy, on De-

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Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Section 841(a)(1) provides:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

cember 22, 1971, entered into a rental agreement for the lease of a house located at 240 Golden Beach Drive, Golden Beach, Florida. The lease was to cover the period January 1, 1972 to April 30, 1972.

Customs agent William Norsworthy testified that he had first received information concerning M/V Nurmi on January 8, 1972, at which time he initiated a search to ascertain where the vessel was berthed. On January 11, 1972 and again on January 12 she was located at the dock behind the residence at 240 Golden Beach Drive.

Several further sightings of M/V Nurmi occurred which, taken together, proved quite convincingly that the vessel had been at a foreign port or place.[2]

On February 6, after returning from International waters, Ingham was observed docking and leaving the vessel by the agents. They then observed co-defendant

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[2]Sightings occurred on:

Jan. 25 and 26: by a private citizen, a government witness, that he saw M/V Nurmi in Cartagena, Columbia and that the Appellant was on board.

Feb. 6, 1972: at 1:00 p.m. by Customs agent Lynch in Bahamian waters near Cat Cay.

at 2:30 p.m. by Customs agent Lynch about 15 miles west of Bimini heading toward the Florida coast.

at 7:25 p.m. by Customs agent Walsh as it entered inland waters from the Atlantic Ocean through Baker's Haulover Cut, then turned north and headed up the intercoastal waterway.

at 7:45 p.m. by Customs agent Burton traveling north on the intercoastal waterway as it passed under the Sunny Isles Boulevard Bridge.

at 8:00 p.m. by Customs agents Lynch and Norsworthy as it left the intercoastal waterway, entered a canal at the north end of South Island, and docked behind the residence at 240 Golden Beach Drive.

McCarthy open the garage doors, at which time they approached him and identified themselves. At this point Ingham and co-defendant Meiggs ran out of the house and into the backyard where they were apprehended by other Customs agents. At approximately 8:05 p.m. McCarthy took the agents through the house and to M/V Nurmi where the agents detected the odor of marijuana and observed burlap bags in the after cabin. The agents subsequently discovered 79 such burlap bags on board containing 4,000 pounds of marijuana which were seized.

[3] We are asked to accept the argument that when authorized federal agents elect not to search a vehicle or vessel at the point of crossing an international boundary line, and, further, when the agents voluntarily elect not to follow the vehicle or vessel after the crossing, and lastly, when the agents, who have not observed the crossing, have sufficient time, both before and after the suspected crossing, to obtain a warrant—if possible—then, the warrantless search and seizure of the vessel or vehicle becomes unreasonable.

[4] As support for this principle appellant cites a number of Ninth Circuit cases[3] which he asserts stand for the proposition that the absence of "actual observation" of a boundary crossing precludes a subsequent search from qualifying as a "border search."

Our reading of these airplane and automobile cases reveals no such rubric. Three of the cases turn on the

[3]The appellant cites United States v. Mollat, 9 Cir., 1971, 448 F.2d 789, (airplane search), United States v. Carrion, 9 Cir., 1972, 457 F.2d 200, (airplane search), United States v Garcia, 9 Cir., 1969, 415 F.2d 1141, (automobile search), and Contreras v. United States, 9 Cir., 1961, 291 F.2d 63, (automobile search).

absence of any indication of a border crossing, and not on the lack of an actual observation of a border crossing. United States v. Mollat, 9 Cir., 1971, 448 F.2d 789; United States v. Carrion, 9 Cir., 1972, 457 F.2d 200, 202; United States v. Garcia, 9 Cir., 1969, 415 F.2d 1141, 1144. Further, appellant's final case, Contreras v. United States, 9 Cir., 1961, 291 F.2d 63, held as illegal the search of an automobile that was stopped 72 miles from the border after it had already been allowed through at the border and had not been the object of pursuit or surveillance after the actual border stop.

We conclude, then, that these Ninth Circuit holdings are in no way inconsistent with the search here. The close surveillance of the M/V Nurmi revealed a border crossing and was followed by a continued sighting of the vessel until the search when she finally docked. In addition, although the events of this case are pre-Almeida-Sanchez, it matters not, since the facts do not qualify it as an Almeida-Sanchez border search. In Almeida-Sanchez, 1973, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596, the Supreme Court held as illegal the search of an automobile 25 miles north of the border with no indication that the car had even crossed the border. The Court pointed out that

> In the present case, by contrast, there was no such assurance that the individual searched was within the proper scope of official scrutiny—that is, there was no reason whatever to believe that he or his automobile had even crossed the border, much less that he was guilty of the commission of an offense.

413 U.S. at 271-272, 93 S.Ct. at 2539.

Moreover, loath as we are to suggest further distinctions in this dynamic ever-expanding area, this may well be a Reverian "one if by land, two if by sea". For there is by act of God, nature, the Congress, and the activities of man a great difference between the landlocked vehicle and the nautical vessel in relation to our International borders. Congress has long recognized this and the law has to—and does—reckon with these differences often very specifically.[4]

There is no hard and fast rule that there must be an actual visual sighting of an international boundary crossing. In United States v. Hill, 5 Cir., 1970, 430 F.2d 129, a case whose facts are strikingly similar to the facts here, we rejected the like contention that the vessel was never actually seen crossing the international boundary three miles out at sea and thus the seized contraband should have been held inadmissible. Of "border searches" we wrote—

> "The extraordinary deference accorded this unique category of searches is based on a recog-

[4]The statutes dealing specifically with vessels and their entry for revenue and customs purposes are replete. A few are: 19 U.S.C. §282 (foreign-purchased merchandise to be used on the vessel); 19 U.S.C. §1131 (manifest on board to indicate a ship); 19 U.S.C. §1133 (report of arrival of vessel); 19 U.S.C. §1431 (entry of American vessels); 19 U.S.C. §1136 (failure to report entry of vessel); 19 U.S.C. §1460 (failure to file manifest); 19 U.S.C. §1467 (special inspection, examination, and search of vessel); 19 U.S.C. §1485 (consignee declaration of goods on entry); 19 U.S.C. §1581 (boarding of vessels); 19 U.S.C. §1701 (defines customs enforcement area and applies to hovering vessels); 19 U.S.C. §1706 (importation in vessels under 30 tons); 19 U.S.C. §1709 (definition of customs vessel).

> nition of the difficulty involved in effectively policing our national boundaries. The facts of the present case dramatically illustrate the burden we would be placing on the officers charged with this responsibility, were we to accept appellant's position."

United States v. Hill, supra at 131.

[5] The law—indeed criminal law—allows for common sense. And common sense allows persons in their affairs to draw inferences from circumstances. If credited, as was obviously done by the jury's verdict, the events detailed above (note 2, supra) revealed that both vessel and Ingham were in a foreign port and within a few hours time proceeded from international waters into domestic coastal waters and within less than an hour she was alongside the dock where the search took place. She could not have been both near Cat Cay and at the Florida dock on the same day unless she had made a voyage from outside the United States to the Florida dock. Just as did the jury, the Judge on the suppression motion could add up all these factors to conclude that the officers had ample grounds for believing that entry from international waters had just been made. For the protection of the revenues[5] and national security, the officers are entitled

[5]One of the primary purposes of the customs regulations is to raise revenues. Consequently, as custom's search revolves around goods and not persons. See note 1, supra. The customs search statutes are the very foundation for the vast amounts collected yearly from imports. The revenues from customs collections in 1972 alone amounted to $1,191,539,806.

According to an August 16, 1972 news release from the Bureau of Customs, the 15 largest collection districts and areas are as follows. Each is designated by its headquarters court.

to search a newly arrived vessel to determine whether goods requiring entry are aboard. 19 U.S.C.A. § 1581(a).[6] For such a vessel under such a situation they need not

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Total Customs Collections
Fiscal Year 1972

1.	New York, N. Y.	$998,101,046
2.	Los Angeles	368,480,700
3.	Detroit	293,366,934
4.	JFK Airport	287,888,472
5.	Chicago	220,548,208
6.	San Francisco	180,260,131
7.	Philadelphia	174,445,912
8.	Baltimore	135,314,589
9.	Boston	130,702,129
10.	Seattle	129,581,372
11.	New Orleans	112,229,817
12.	Houston	102,860,629
13.	Ogdensburg	92,253,187
14.	Cleveland	91,501,636
15.	Buffalo	84,170,595

[6] 19 U.S.C.A. §1581(a) provides in part:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters . . . and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

Of course, the exercise of this power must still be reasonable. United States v. McDaniel, 5 Cir., 1972, 463 F.2d 129, 134. Judge Goldberg concluded that "under all of the circumstances involved here, the search of the vehicle was reasonable under the customs and immigration statutes and within the otherwise stricter confines of the Fourth Amendment." Id. at 134.

In United States v. Caraway, 5 Cir., 1973, 474 F.2d 25, the search of a vessel under 19 U.S.C. §1581(a) was held illegal since there was no indication that the vessel had crossed an international boundary or that the contraband in question had ever been on the vessel. Caraway, however, lends no precedential value since the indictment underlying

be searching for anything more noxious than a bottle of Chanel No. 5.

The search was reasonable. There it ends.

Affirmed.

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the appeal from a conviction was later dismissed by the District Court, thus rendering the issues moot. United States v. Caraway, 5 Cir., 1973, 483 F.2d 215, 216.

In addition to the search and seizure question, Caraway also concluded that a plea of nolo contendre, if coupled with an understanding from the Judge, would not destroy a challenge on appeal to evidence obtained from an allegedly unlawful search and seizure. This procedure was later criticized in United States v. Sepe, 5 Cir., 1973, 486 F.2d 1044, 1045, and United States v. Mizell, 5 Cir., 1973, 488 F.2d 97, 99-100.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

December 23, 1974

TO ALL COUNSEL OF RECORD

Re: 72-2393 U.S.A. V. INGHAM

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By /s/ Irme G. Parent
Deputy Clerk

cc: Mr. Jack Ciolino
Messrs. J. David Rosenfield
Harvey Schneider
Ms. Barbara E. Vicevich

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of January, 1975, three copies of the Petition for Writ of Certiorari were mailed, postage paid, to the Honorable Robert Rust, U.S. Attorney, 300 Ainsley Building, Miami, Florida and to Ms. Barbara Vicevich, Assistant U.S. Attorney, Suite 300 Ainsley Building, Miami, Florida attorneys for Respondent. I further certify that all parties required to be served have been served.

DAVID B. JAVITS

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-902

DENNIS EVANS INGHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the warrantless search of his vessel by Customs officials, conducted without probable cause to believe the vessel contained contraband, violated his Fourth Amendment rights.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of illegally importing 4,000 pounds of marijuana into the United States (count 2), in violation of 21 U.S.C. 952(a); of conspiring to commit that offense (count 1), in violation of 21 U.S.C. 963; and of possessing marijuana with the intent to distribute it (count 3), in violation of 18 U.S.C. 841(a)(1) (Pet. App. 1-8).[1] Peti-

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[1]Also named in all three counts of the indictment were Stephen Thomas McCarthy and Keith Meiggs. Both entered guilty pleas prior to petitioner's trial, Meiggs to count 1, and McCarthy to counts 1 and 3.

tioner was sentenced under 18 U.S.C. 4208(a)(2) to concurrent terms of five years' imprisonment on count 1 and two years' imprisonment on counts 2 and 3, to be followed by a special parole term of two years on each count (Pet. App. 7). The court of appeals affirmed (Pet. App. 9-20) in an opinion reported at 502 F.2d 1287.

The evidence at trial is set forth in the opinion of the court of appeals (Pet. App. 13-15). On December 13, 1971, petitioner, using the alias Dennis Kaufman, purchased the 42-foot vessel in question, M/V Nurmi, for $55,000 in cash. Customs Agent William Norsworthy testified that on January 8, 1972, as a result of certain information concerning M/V Nurmi that he had received, a search was undertaken to determine the whereabouts of this vessel. It was discovered on January 11, docked behind the premises at 240 Golden Beach Drive, Golden Beach, Florida—premises leased by petitioner's co-defendant, McCarthy, on January 1, 1972, for a period of four months (Pet. App. 13-14). On January 25 and 26, the vessel was sighted at Cartagena, Columbia, with petitioner aboard.

On February 6, 1972, the vessel was sighted several times—first at 1:00 p.m. near Cat Cay in Bahamian waters; an hour and a half later, about 15 miles west of Bimini, heading toward the Florida coast; at 7:25 p.m., entering inland waters from the Atlantic Ocean; and then, twenty minutes later, traveling up an intercoastal waterway. Finally, at 8:00 p.m., it was observed docking at the Golden Beach Drive premises, and petitioner was seen leaving the vessel (Pet. App. 14).

Customs agents then observed co-defendant McCarthy open a garage door, at which time they approached him and identified themselves. At that point, petitioner and co-defendant Meiggs ran out of the house and were apprehended in the backyard. At approximately 8:05 p.m., McCarthy took the agents on board the M/V Nurmi, where they detected the odor of marijuana and subsequently discovered 4,000 pounds of marijuana in burlap bags in the after cabin of the vessel (Pet. App. 14-15).

1. Petitioner contends that because his vessel was not searched as soon as it crossed the international boundary into the United States and was not under constant surveillance from that time until the time it docked, the search conducted by Customs agents was illegal in the absence of an authorizing warrant or probable cause to justify a search for contraband. However, it is settled that in carrying out their duties to ascertain if merchandise being brought into this country is subject to duty or has been unlawfully imported, Customs agents are authorized to enter vessels or other conveyances at our international boundaries and conduct searches without warrants, "whether or not there be any suspicion of illegality directed to the particular person or thing to be searched." *United States* v. *Odland*, 502 F.2d 148, 151 (C.A. 7), certiorari denied, December 23, 1974, No. 74-348. See also *Boyd* v. *United States*, 116 U.S. 616, 623; *Carroll* v. *United States*, 267 U.S. 132, 153-154; *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 288 (dissenting opinion of Mr. Justice White) ("[T]he legality of search-

ing, without warrant and without probable cause, individuals and conveyances seeking to enter the country has been recognized by Congress and the courts since the very beginning.").[2]

Contrary to petitioner's assertion, the Customs search in this case did not become illegal simply because the search was conducted in inland waters rather than at the immediate international boundary. In *Alexander* v. *United States*, 362 F.2d 379, 382 (C.A. 9), the court stated the rule governing Customs searches that are not conducted in the immediate vicinity of the international border:

> * * * [T]he legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States. Any search by Customs officials which meets this test is properly called a "border search."

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[2]Congress has expressly authorized Customs agents to board vessels for such purpose in 19 U.S.C. 1581, which provides in pertinent part:

> (a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under sections 1701 and 1703 to 1711 of this title, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

The evidence shows that petitioner's vessel entered the United States from international waters sometime between 2:30 p.m. and 7:25 p.m. on February 6, 1972. Moreover, based upon the surveillance of the vessel from 7:25 p.m. until the search forty minutes later, the trial judge and jury could, and obviously did, conclude with "reasonable certainty" that the marijuana was on board the vessel at the time it crossed our international boundary. There is no cause for further review in this Court of that factual determination. As the court of appeals here properly noted (Pet. App. 17-18):

> * * * [T]here is by act of God, nature, the Congress, and the activities of man a great difference between the landlocked vehicle and the nautical vessel in relation to our International borders. Congress has long recognized this and the law has to—and does—reckon with these differences often very specifically.
>
> There is no hard and fast rule that there must be an actual visual sighting of an international boundary crossing. In *United States* v. *Hill*, 5 Cir., 1970, 430 F.2d 129, a case whose facts are strikingly similar to the facts here, we rejected the like contention that the vessel was never actually seen crossing the international boundary three miles out at sea and thus the seized contraband should have been held inadmissible. Of "border searches" we wrote—
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> > "The extraordinary deference accorded this unique category of searches is based on a recognition of the difficulty involved in effectively policing our national boundaries. The facts of the present case dramatically illustrate the burden we would be placing on the officers charged with

this responsibility, were we to accept appellant's position."

United States v. *Hill*, *supra* at 131. [Footnote omitted.][3]

2. Petitioner's reliance (Pet. 4-7) on *Almeida-Sanchez* v. *United States*, *supra*, and its progeny is misplaced. For one thing, in *Almeida-Sanchez* the Court found that "there was no assurance that the individual searched was within the proper scope of official scrutiny—that is, there was no reason whatever to believe that he or his automobile had even crossed the border, much less that he was guilty of an offense" (413 U.S. at 271-272). As demonstrated above, the facts here, including the surveillance of the vessel by the Customs agents, clearly showed that it had crossed the border from international to interior waters and thus was "within the proper scope of official scrutiny." See Pet. App. 16. More importantly, *Almeida-Sanchez* and the follow-up cases presently before the Court concern the validity of the Border Patrol's traffic checking procedures carried out in the interior of the United States to detect the presence of illegal aliens in this country. Nothing in those cases is pertinent to the very different factual context presented here or to resolution of the entirely distinct issue raised by petitioner.

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[3]While petitioner's vessel was not under surveillance as closely as was the vehicle involved in *Alexander* v. *United States*, *supra*, the court in that case noted that the *manner* as well as the extent of surveillance was an important factor in determining the validity of the search. As the court below noted, "[t]he law * * * allows for common sense" (Pet. App. 18), and common sense dictates that a different manner of surveillance is required in a situation involving a vessel on the high seas or in inland waters, from that involved when dealing with vehicles on the highway. Perhaps use of helicopters or a trailing vessel would have enabled the Customs agents to maintain petitioner's vessel under constant surveillance, but such a procedure would hardly lend itself to the apprehension of those engaged in smuggling activities, since it would put them on notice that their every move was being watched.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.